BEATRICE HALKETT

IBLA 96-101 Decided August 20, 1999

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring Native allotment application AA-12 terminated as a matter of law.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A decision declaring a Native allotment application terminated by operation of law pursuant to 43 C.F.R. § 2561.1(f) for failure to file proof of use and occupancy within 6 years after filing the application is properly affirmed when no evidence of use and occupancy was filed within 6 years of the filing of the application. Although notice and an opportunity for a hearing are generally required before a Native allotment application is rejected on the ground of the sufficiency of the evidence, no hearing is required when no evidence of 5 years of use and occupancy was tendered in support of the application and, hence, it is deficient as a matter of law.

Winifred A. Otten, 136 IBLA 166 (1996), overruled to the extent inconsistent.

APPEARANCES: Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; James R. Mothershead, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Beatrice Halkett has appealed from an October 16, 1995, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring

Native allotment application AA-12 terminated as a matter of law for failure to file proof of 5 years of substantially continuous use and occupancy within 6 years of the filing of her application as required by 43 C.F.R. § 2561.1(f). 1/

On July 5, 1966, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-12 for Halkett describing by metes and bounds 40 acres of land located in T. 6 N., R. 4 W., Copper River Meridian. 2/ In the application, Halkett claimed use and occupancy of the land from March 1, 1964. On September 8, 1967, BLM sent a letter to Halkett informing her of the acceptance of her application and the necessity to submit proof of substantially continuous use and occupancy of the lands for a period of 5 years. It informed her if she did not file such proof by July 4, 1972, "your application will terminate without prejudice to your filing a new application at that time." On December 13, 1971, BLM sent a letter to the Superintendent, BIA, Anchorage Agency, informing him that the "statutory life" of Halkett's allotment application would expire on July 4, 1972, in the absence of the filing of evidence of use and occupancy.

On August 22, 1972, BLM closed the case file for Native allotment application AA-12 because no evidence of use and occupancy had been filed.

On November 24, 1982, BLM reinstated the application pending further review. In December 1983, BLM issued a decision informing Halkett that her Native allotment application was legislatively approved in accordance with section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1982). BLM subsequently vacated that decision in October 1984, stating that ANILCA provided for a 180-day protest period in which interested parties could file a protest. BLM explained that the 180-day protest period extended from December 2, 1980, until June 1, 1981, a time during which Native allotment application AA-12 was closed, and that, upon reinstatement of the application, BLM had failed to provide notice of a protest period. By its decision it provided notice to the State of Alaska, Native corporations, and other interested parties that, in accordance with section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), they had an opportunity to file a protest to the

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1/ This regulation was originally enacted as 43 C.F.R. § 67.5(f) on Dec. 6, 1958 (23 Fed. Reg. 9484). At the time Halkett's application was filed, the requirement of filing proof of 5 years use and occupancy within 6 years of the filing of the application was codified at 43 C.F.R. § 2212.9-3(f) (1966). It is now found at 43 C.F.R. § 2561.1(f). This regulation is sometimes referred to as the "statutory life" regulation. See William Demoski, 143 IBLA 90, 99 n.2 (1998) (Administrative Judge Burski concurring.)

2/ That land, located on Crosswind Lake, is presently described as Lot 8 of U.S. Survey 5646, T. 6 N., R. 4 W., Copper River Meridian.

application within 60 days of receipt of the decision. On November 23, 1984, the State filed a timely protest in order to protect access to public lands and resources by a winter trail crossing land embraced by the application.

On November 1, 1989, BLM sent a letter to the State acknowledging receipt of the protest and explaining that the application would be adjudicated pursuant to the Native Allotment Act of May 17, 1906 (Native Allotment Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), subject to pending applications.

On November 10, 1992, BLM approved a field report in which the BLM realty specialist explained that Halkett claimed to have used the allotment for fishing during the summer months from 1964 to 1969 when she would travel to Crosswind Lake from her home in Anchorage by float plane with her husband. He stated:

> The Crosswind Lake trail bisects Ms. Halkett's Allotment application. This trail was constructed by the Military for winter training exercises in 1960. The public has used this trail for access into Crosswind Lake ever since. The trail existed four years prior to Ms. Halkett's claimed use and occupancy date.

(Field Report at 2.) Despite the lack of any apparent sign of use attributable to Halkett, the reality specialist concluded, based on the availability of resources, that "[i]t appears that the applicant has complied with the use and occupancy requirements of the Native Allotment Act of 1906." Id. at 4.

Thereafter, BLM issued the decision challenged in this appeal. Although the parties have provided extensive briefing in this case, the outcome is dictated by recent Board precedent. In the statement of reasons for appeal, counsel for Halkett relies on Andrew Balluta, 122 IBLA 30 (1992), and Michael Gloko, 116 IBLA 145 (1990), as dictating that Halkett's application did not terminate as a matter of law. However, in Jacqueline Dilts, 145 IBLA 109 (1998), we overruled Gloko and Balluta, as had been suggested by Administrative Judge Burski in his concurrence in William Demoski, 143 IBLA 90, 116 (1998), and upheld a BLM decision declaring a Native allotment application terminated by matter of law.

The Dilts case involved facts similar to those in this case. Dilts was the heir of Harry W. Nickoli. Native allotment application A-063985 was filed by the BIA on behalf of Harry Nickoli on November 23, 1965. Nickoli claimed use and occupancy starting November 22, 1965. The notice issued by BLM to Nickoli to inform him that the application would terminate without prejudice to filing a new application if proof of substantially continuous use and occupancy of the lands for a period of 5 years was not

filed by November 22, 1971, was returned to BLM by the Post Office as undeliverable. However, thereafter BLM notified BIA that Nickoli had not filed proof of use and occupancy and stated that he had to do so by November 22, 1971. When Nickoli failed to submit the required proof of 5 years use and occupancy, BLM closed the file without further notice to him on December 3, 1971.

BLM reinstated Nickoli's Native allotment application in 1983. However, in 1994 it declared his application terminated as a matter of law for failure to file proof of 5 years of substantially continuous use and occupancy within 6 years of the filing of his application as required by regulation. The Board affirmed relying on this Board's decision in Heirs of Edward Peter, 122 IBLA 109 (1992).

In Edward Peter, the heirs appealed a BLM decision confirming approval of a Native allotment application filed by Peter in 1968. The heirs sought to show that an earlier application filed by Peter in 1962, embracing more land, should have been reinstated and approved. The Board found, however, that the 1962 application did not, on its face, allege compliance with the requirement that qualifying use and occupancy be shown for 5 years and that the application had terminated in accordance with 43 C.F.R. § 2561.1(f), which provides that the failure to file evidence of use and occupancy within 6 years of filing the application itself causes the application to terminate. 3/

In Dilts, the Board recognized that the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), provided that the interest of a Native in an allotment application gives rise to a due process right to notice and an opportunity for a hearing prior to rejection of the application on the ground that the evidence of record is insufficient to establish that the applicant achieved 5 years of qualifying use and occupancy. However, we noted an exception to that general rule, which the Board applied in Edward Peter. The exception is that the Pence v. Kleppe notice and hearing requirements are not applicable to cases in which "taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act." Franklin Silas, 117 IBLA 358, 364 (1991), clarified on judicial remand, Franklin Silas, 129 IBLA 15 (1994), aff'd, Silas v.

3/ While the Board stated in Edward Peter that BLM issued a notice on Apr. 3, 1968, informing Peter of the termination, there is no express statement in the decision that Peter received the notice. Nonetheless, under the Board's rationale, notice from BLM was not critical:

"Allotment application Fairbanks 029185 therefore terminated at the expiration of its 6-year regulatory life on February 19, 1968, pursuant to Departmental regulation. Peter was charged with knowledge of the regulation and therefore knew that the application terminated at that time. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)."
122 IBLA at 114.

Babbitt, 96 F.3d 355 (9th Cir. 1996); Agnes Mayo Moore, 91 IBLA 343, 347 (1986). As the Board stated in Edward Peter, the "declaration of termination did not constitute an implicit factual assessment of Peter's original application or of any other proof of use and occupancy, but was a legal conclusion derived from the absence of any such proof in the record." 122 IBLA at 115.

We concluded in Dilts that BLM had properly declared the application terminated as a matter of law for failure to file proof of 5 years of substantially continuous use and occupancy within 6 years of the filing of his application as required by regulation.

The same result must follow in this case. Halkett claimed use and occupancy from 1964 in an application filed in 1966. That application terminated as a matter of law in 1972 when she failed to file evidence of use and occupancy, as required by regulation. Because there was no factual dispute, BLM's October 16, 1995, declaration of the termination of the application in 1972 was proper and no Pence hearing is required.

Counsel for Halkett cites our decision in Winifred Otten, 136 IBLA 166 (1996), as dictating a different result. In Otten, the Native allotment applicant appealed a BLM decision declaring her Native allotment application terminated as a matter of law as to Parcels D and E. Otten had filed two different allotment applications for a total of 320 acres. The first, filed in 1968, related to the two parcels later identified as Parcels D and E, and described as containing 160 acres. She filed a second application in 1971 for three parcels (Parcels A, B, and C) also described as totaling 160 acres. Although BLM requested relinquishment of the first application, Otten never responded.

In 1976, BLM approved the second application for Parcels A, B, and C and following a survey which determined that the three approved parcels totaled 123.09 acres, BLM issued a certificate of allotment to Otten. In addition, in 1979, it rejected Otten's first application because the statutory life of that application had expired in 1974 without evidence of use and occupancy being filed.

In 1986, BLM reinstated Otten's application for Parcels D and E and conducted a field examination concluding that Otten had used and occupied the land, noting, however, that she could only receive title to 36.91 acres because of her previous allotment of 123.09 acres. Thereafter, Otten relinquished Parcel E and all acreage in Parcel D in excess of 36.91 acres. Nevertheless, by decision in 1993, BLM declared the application as to Parcels D and E terminated as a matter of law because of the failure to file the required evidence of use and occupancy within 6 years of the filing of the application.

In our decision we acknowledged that the record was devoid of evidence of use and occupancy at the time BLM issued its decision in 1979; however, we stated that the record on appeal and before BLM when it made

its 1993 decision contained evidence of use and occupancy. The Board held at 136 IBLA 175, citing Balluta: "Given these circumstances, we conclude that Otten is entitled to have her application for Parcel D as presently identified reinstated."

In its answer in this case, BLM criticizes the Otten decision, arguing that it is inconsistent with the Board's rationale in Edward Peter, supra. BLM asserts that evidence presented after the automatic termination of an application "cannot override the self-executing regulation requiring the filing of proof of use and occupancy within 6 years after the application is filed." Id. at 33. BLM argues that Halkett's application terminated on July 4, 1972, when she failed to file proof of use and occupancy within 6 years of the filing of her application and that any subsequent showing of use and occupancy is irrelevant to, and cannot affect an already terminated, nonexistent application.

We must agree that it was improper in Otten to reinstate the application based on evidence of use and occupancy developed after the automatic termination of the application. Herein, in 1995, BLM properly declared the application to have terminated in 1972, declining to be influenced by the 1992 field report. Accordingly, to the extent Otten is contrary to the result reached in this case, Otten is overruled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James P. Terry
Administrative Judge